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Case Name:

Nipissing Condominium Corp. No. 4 v. Kilfoyl

Between

**Nipissing Condominium Corporation No. 4, Applicant, and
Paul Kilfoyl, Stephanie Kilfoyl, and unknown occupiers of Unit
667-7 Gormanville Road, North Bay, Ontario, Respondents**

[2009] O.J. No. 3718

Barrie Court File No. 09-0200

Ontario Superior Court of Justice

A.J. Stong J.

Heard: September 3, 2009.

Judgment: September 9, 2009.

(41 paras.)

Counsel:

Sonja Hodis, for the applicant.

Paul E. Trenker, for the respondents.

1 A.J. STONG J.:-- In this application the applicant seeks:

- (a) a declaration that the occupancy of the respondents McGuire, Mous, Bruce and Campbell is that of a roomer and/or boarder and not a "single family" and as such is in contravention of part III section 5 of the Declaration and Article XIV(j) of By-law No. 1 registered on title to unit 667-7 Nipissing Condominium Corporation No. 4;
- (b) a declaration that the respondents Kilfoyl are in breach of section 119 of the *Condominium Act 1998*;
- (c) A declaration that the units of Nipissing Condominium Corporation No. 4 can only be occupied as a one family residence as defined by the Declaration registered on title and that multiple unrelated tenants are a breach of the Declaration and Bylaw No. 1;
- (d) An Order under s. 134 of the *Condominium Act*, 1998 that the Respondents, and any future occupants of Unit 667-7 are to comply with the occupancy restrictions found in Part III, Section 5 of the Declaration and Article XIV (j) of Bylaw No. 1 which is registered on title to Unit 667-7, Nipissing Condominium Corporation No. 4 and their obligations under s. 119 and s. 83 of the *Condominium Act*, 1998;

- (e) An Order that this Order be provided to all occupants of Unit 667-7 present and future and be attached to all status certificates issued for this unit;
- (f) An Order dispensing with the necessity to obtain approval of the Order as to form and content from the Respondents with the exception of the Respondents Kilfoyl; and,
- (g) Costs against the Respondents Kilfoyl, Mous and McGuire on a full indemnity scale.

JURISDICTION

2 The respondents Paul Kilfoyl and Stephanie Kilfoyl seek a dismissal of this application on the basis that section 134(2) of the *Condominium Act* requires this dispute to be first dealt with by mediation/arbitration, which has not occurred, prior to seeking a section 134 compliance order.

3 This case involves intertwined issues under the *Condominium Act* and the Condominium Declaration that go beyond the owners of the units and the Corporation, who are the only parties referred to in the requirement of mediation - arbitration in section 132(4) and (1); and goes beyond the enforcing of compliance with any provisions of the *Condominium Act*, the Declaration, the By-laws, the Rules as contemplated by section 34(1) of the *Condominium Act* and as such exceeds the issues of conduct and use and gradations thereof. It involves a challenge in law with respect to the Declaration, in that it is discriminatory and therefore in violation of the *Ontario Human Rights Code*. The respondents have proceeded with cross-examinations in this application, and have not brought a motion for a stay of the application and therefore are deemed to have elected the method of process chosen by the applicant and have waived their right to mediation and arbitration.

4 The resistance to this application proceeding before this case is denied.

FACTS

5 The applicant is a condominium corporation consisting of 60 townhouse units. The majority of the townhouse units were built with three bedrooms although some units were only built with two bedrooms.

6 The Declaration of Nipissing Condominium Corporation No. 4, hereinafter referred to as NCC No. 4, was registered on title to all units on December 16, 1975.

7 The Declaration has a provision that states under Part III section 5 that:

The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

- (1) each unit shall be occupied only as a one family residence. For the purpose of these restrictions "one family residence" means a unit occupied or intended to be occupied as a residence by one family alone, including guests and containing one kitchen, provided that no roomers or boarders are allowed. A "boarder" for the purpose of these restrictions is a person whom room and board are regularly supplied for consideration and a "roomer" is a person to whom room is regularly supplied for consideration.

8 A family is defined in Part I (1) as "a social unit consisting of parent(s) and their children, whether natural or adopted and includes other relatives if living with the primary group".

9 The applicant has interpreted "family" to mean occupants who are related.

10 The applicant enacted By-law No. 1 which was registered on title to all units on February 20, 1976.

11 Article XIV of Bylaw No. 1(j) states:

No person shall occupy or visit any part of a unit or a combination of units under circumstances where such person is being charged for occupation, for board, or otherwise but this provision shall not prevent the leasing of any unit.

12 Beginning in 2005 problems with multiple tenants arose. As the number of units that were being rented to multiple tenants began to increase, NCC No. 4 began to experience a rise in the complaints about excessive noise, littering, parking problems, damage to property and an increase in common expenses. Those units which violate the occupancy

restriction are receiving the benefit of the return on their investment while the other owners are picking up the additional costs being incurred as a result of these multiple tenancies.

13 NCC No. 4 has taken steps to correct the situation, seeking legal advice, notifying owners of the occupancy restrictions in accordance with the Declaration and By-laws, resorting to the court to enforce the occupancy restriction and the Declaration and By-law.

14 The board members have been met with retaliation and have had their personal property damaged and human waste left in their mailboxes and on their lawns.

15 The respondents Kilfoyl are the registered owners of unit 667-7 which was purchased on December 17, 2007.

16 The respondents Kilfoyl obtained a Status Certificate prior to purchasing unit 667-7. In the Status Certificate it clearly stated that the occupancy restrictions were being strictly adhered to and that the unit could not be leased to multiple tenants but only to single families. The respondents McGuire, Mous, Bruce and Campbell were the occupiers of the unit at the time the application was commenced. They are not related to each other in any manner. They were students who were renting rooms in unit 667-7.

17 NCC No. 4 has entered into Minutes of Settlement with the respondents Bruce and Campbell. These respondents have consented to the Orders sought and which are executed by this court.

18 The respondents McGuire and Mous have not filed a Notice of Appearance.

19 The respondents Kilfoyl have advised that there are four new occupiers of the unit. The new occupiers are not party to this application. The new occupiers are believed to be students and appear to be unrelated.

20 Between July 17, 2008 and March 24, 2009 NCC No. 4 requested from the respondents Kilfoyl a list of occupants in the unit and advised that the occupancy of the unit was in contravention of the Declaration and the By-laws. On or about March 24, 2009 the respondents Kilfoyl provided the occupancy list for unit 667-7.

21 This occupancy list was not provided until after the applicants had commenced an application in court in February 2009 for an order compelling the respondent to provide the occupancy list. That court order was consented to by the respondents and was an order under section 134 of the *Condominium Act* compelling the respondents to comply with their obligations under section 83 of the *Condominium Act*.

22 Since that consent order was obtained by the applicant, the respondents have had a change of tenants in unit 667-7 and although requested through various notices have failed to comply with the request to ensure the NCC No. 4 that their tenants comply with the occupancy restrictions found in the Declaration and By-law No. 1.

THE LAW

23 Sections 7(4)(b)(c) of the *Condominium Act* permit a Declaration to contain conditions or restrictions with respect to the occupation and the use of the units or common elements of units within the condominium project. Although a Declaration does not have to be reasonable, it must be fair and on that basis is presumed to be valid.

24 Section 17(3) of the *Condominium Act* requires the corporation to take all steps reasonable to ensure that owners, the occupiers of the units, the lessees of the common elements and the agents and employees of the corporation comply with this *Act*, the Declaration, the By-laws and the Rules.

25 Section 83 of the *Condominium Act* requires the owner of a unit who leases the unit or renews a lease of the unit to provide a copy of the lease with the lessees name and the owners address to the corporation within 30 days of entering into the lease. Section 119 of the *Condominium Act* requires an owner and an occupier of a unit to comply with the *Act*, the Declaration, the Bylaws and Rules and requires the owner to take all reasonable steps to ensure that the occupier comply with the *Act*, the Declaration, the By-laws and Rules.

ISSUE

26 The issue in this application is whether the Declaration under Part III section 5 by the NCC No. 4 restricting the occupation and use of the units to that of a one family residence as defined in the Declaration, and as implemented by the applicant restricting occupants to those members of a "family" who are related to each other, contravenes the *Human Rights Code*, and therefore is unenforceable as it stands.

27 Section 2 of the *Human Rights Code* R.S.O. 1990 ch. H19 reads as follows:

2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.

28 Section 10(1) of the *Human Rights Code* defines "family" status as follows:

Family status. Means the status of being in a parent and child relationship.

29 NCC No. 4 is a condominium project geared toward families living in their individual units in the project and sharing communal responsibility for the common areas. The peaceful use and enjoyment by each family of its own unit ought not be breached by the actions of any individual who does not conform to the contractual obligation entered into in accordance with the Declaration when the condominium was purchased. The condominium project is unique in that individual families have their privacy protected within their own units but at the same time are required to live by rules of the community as they pertain to the common areas used by all members of the individual condominium project.

30 The *Human Rights Code* prevents discrimination with respect to accommodation based on family status as defined in the *Code*. NCC No. 4's Declaration with respect to the restriction placed on the use of units is designed to promote the renting of units to families and has been interpreted by the corporation to include in that definition a more expansive definition of family in order to comply with the requirements of the *Human Rights Code*.

31 The restriction in the Declaration in relation to the use of the units does not infringe any grounds listed in section 2(1) of the *Human Rights Code* based on the facts of this case.

32 In Minutes of Settlement entered into between the applicant and the two named respondents Kristen Campbell and Chris Bruce, both respondents acknowledged that they were occupants of unit 667-7 and as such were roomers and/or boarders. They agreed that they would vacate the premises by April 30, 2009 at which point their school year would have been completed. They acknowledged as well that they, with each other and with the other two named respondents Trevor Mous and Chris McGuire, were not "family" as defined in the Declaration. They also acknowledged that they were in breach of the Declaration and By-law No. 1.

RULING

33 The Declaration of NCC No. 4 which restricts the use of the units in the condominium project to a "one family residence" to exclude roomers and/or boarders is a valid declaration and does not infringe the *Human Rights Code*.

34 A "one family residence" is a basic social unit which involves more than merely sharing short term temporary sleeping quarters and shared facilities on a rental basis as is the case here.

ORDERS TO GO IN ACCORDANCE WITH RELIEF SOUGHT ON THE APPLICATION

35 A declaration that the occupancy of the respondents McGuire, Mous, Bruce and Campbell is that of a roomer and/or boarder and not as a single family and as such is in contravention of part III section 5 of the Declaration and Article XIV(j) of By-law No. 1 registered on title to unit 667-7 Nipissing Condominium Corporation No. 4.

36 A declaration that the respondents Kilfoyl are in breach of section 119 of the *Condominium Act 1998*.

37 A declaration that the units of Nipissing Condominium Corporation No. 4 can only be occupied as a one family residence as defined by the Declaration registered on title and that multiple unrelated tenants are a breach of the Declaration and Bylaw No. 1.

38 An Order under s. 134 of the *Condominium Act, 1998* that the Respondents, and any future occupants of Unit 667-7 are to comply with the occupancy restrictions found in Part III, Section 5 of the Declaration and Article XIV (j) of Bylaw No. 1 which is registered on title to Unit 667-7, Nipissing Condominium Corporation No. 4 and their obligations under s. 119 and s. 83 of the *Condominium Act, 1998*.

39 An Order that this Order be provided to all occupants of Unit 667-7 present and future and be attached to all status certificates issued for this unit.

40 An Order dispensing with the necessity to obtain approval of the Order as to form and content from the Respondents with the exception of the Respondents Kilfoyl.

COSTS

41 With respect to costs the costs may be addressed in writing within two weeks of this date.

A.J. STONG J.

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